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Supreme Court of the United States

OCTOBER TERM 1978

No. 78-1335

VILLAGE OF SCHAUMBURG,

Petitioner,

vs.

CITIZENS FOR A BETTER ENVIRONMENT, ET AL.,

Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

RESPONDENTS' BRIEF.

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QUESTIONS PRESENTED FOR REVIEW.

Respondents agree with Petitioner's presentation of Question 3 (Pet. Br. 3). Respondents agree with Petitioner's presentation of Questions 1 and 2 (Pet. Br. 3) with the necessary addition that those questions must be considered in light of the fact that Section 20(g) of Chapter 22 of the Schaumburg Village Code defines "charitable purpose" in such a way as to exclude in all events all amounts paid by a charitable organization to solicitors, all salaries of all other personnel, all attorneys' fees, advertising expenses, and all other costs that the Ordinance labels as "administrative expenses," whether or not those amounts are in fact used to further the charitable purpose of the organization.

RESPONDENTS' ADDITIONAL STATEMENT OF THE CASE.

Petitioner's statement of the case omits facts of critical materiality to this Court's consideration of both the constitutionality of the charitable solicitation ordinance of the Village of Schaumburg (the "Village") and the propriety of summary judgment in this case. Accordingly, Respondents Citizens for a Better Environment ("CBE") and Larry A. Hoellwarth add the following facts to correct those omissions.

Paragraph 3 of CBE's Amended Complaint (A. 6), verified by the affidavit of co-plaintiff Hoellwarth (A. 13), stated the following: CBE is an Illinois not-for-profit corporation organized for the purpose of protecting, maintaining and enhancing the quality of the Illinois environment. Incident to that purpose, CBE employs canvassers who go door-to-door in the Chicago metropolitan area distributing literature on environmental topics, answering questions on environmental matters posed by residents, soliciting contributions to support CBE and its program and receiving pollution complaints from residents for CBE's evaluation and assistance. This canvassing procedure is an effective means of making the public aware of CBE as a source of assistance in environmental problems.

CBE's Motion for Summary Judgment (A. 39) was supported by another affidavit by co-plaintiff Hoellwarth (A. 40-41) further describing CBE and its use of canvassers: CBE is in good standing with the Office of the Illinois Attorney General and has been granted both tax exempt and tax deductible status by the United States Internal Revenue Service. CBE's staff of canvassers are screened, trained and observed prior to hire. After training each canvasser is registered with the office of the Illinois Attorney General and attends regular seminars on developments in the environmental movement twice a week throughout his or her period of employment by CBE. CBE canvasses nearly every Northeastern Illinois community yearly. This door-to-door canvass is the single most important source of funds for the CBE program, because CBE is almost entirely supported by small contributions from individual citizens. In the door-to-door canvass CBE representatives distribute informative pamphlets on environmental subjects and on CBE activities, answer questions posed by residents, accept pollution complaints on a form provided for follow-up investigation and possible action by CBE, accept signatures to a statement of citizens' support for CBE's program and accept contributions.

CBE also submitted a Supplemental Affidavit (A. 43) by Kenneth M. Arway, its Director of Development, in support of its Motion for Summary Judgment. Mr. Arway stated that CBE's 1975 certified audit showed that 23.3% of its income was spent on fundraising and 21.5% of its income was spent on administration, and that CBE's 1976 certified audit showed that 23.3% of its income was spent on fundraising and 16.5% of its income spent on management. Mr. Arway also described CBE's in-house research staff, which includes an expert on nuclear power, a physicist, a biochemist, a geneticist, an expert on electric utilities and a research associate.[1]

None of those verified allegations in CBE's Amended Complaint, and none of the sworn statements in its supporting affidavits, was contravened by proof (in the form of affidavits or otherwise) by the Village. In its unverified Answer (A. 26-27) the Village stated only that it lacked knowledge sufficient to

1. In its Statement of the Case (Pet. Br. 7), the Village asserts without support that "More than 60% of the funds collected [by CBE] have been spent for the benefit of employees and not for any charitable purposes." Although the Village so alleged *on information and belief* as an affirmative defense (A. 33), that unsupported allegation is refuted by Mr. Arway's affidavit. In fact, even to the extent that the Village seeks to rely on the newspaper articles attached to its Answer (A. 35-37), the articles provide support for CBE's position that salaries paid to its staff and canvassers furthered CBE's charitable purpose.

form a belief as to the truth of the allegations in verified Amended Complaint Paragraph 3. Indeed, the Village went on to state that "the facts alleged in said paragraph 3 even if true, would not be relevant or material to the issues in this case with the exception that the Defendants state on information and belief that the CBE employs 'canvassers' who solicit funds for the purported purposes of the organization."

As an affirmative defense the Village alleged (A. 33), but solely on information and belief, that CBE is primarily devoted to raising funds for the benefit and salary of its employees, that its charitable purposes are negligible as compared with the primary objective of raising funds, and that more than 60% of the funds collected have been spent for the benefit of CBE's employees. No proof of those allegations was ever presented; two unverified and undocumented newspaper articles were attached as an exhibit to the Answer (A. 35-37).

As its sole response to CBE's Motion for Summary Judgment the Village filed an Answer (A. 42) consisting entirely of legal conclusions, unsupported by any affidavits, depositions or exhibits. Although the Village stated "that there are genuine issues as to material facts and the Plaintiffs are not entitled to judgment as a matter of law," it did not specify what issues and what material facts were contested. It did not deny or contest any of the matters stated in the Hoellwarth or Arway affidavits.

The District Court granted plaintiffs' motion for summary judgment, declaring Schaumburg Village Ordinance No. 1052 § 3(g), codified as Schaumburg Village Code § 22-20(g) (A. 23, the "Ordinance"), unconstitutional on its face, and enjoined enforcement of the Ordinance (A. 50-52). The Court of Appeals for the Seventh Circuit affirmed the District Court judgment. 590 F. 2d 220 (7th Cir. 1978).

Ordinance § 22-20 (A. 22-23) requires that "every charitable organization which solicits or intends to solicit contributions from persons in the village by *door-to-door solicitation* or *the use of public streets and public ways,* shall prior to such

solicitation apply for a permit" [emphasis added]. The District Court found that Section 20-22(g), requiring the applicant to prove "that at least 75% of the proceeds of such solicitation will be used directly for the charitable purpose of the organization," set up an unconstitutional condition to obtaining that permit and thus constituted an unreasonable restraint on the plaintiff's exercise of constitutional rights (A. 53).

SUMMARY OF ARGUMENT.

Schaumburg Ordinance § 22-20 prohibits the solicitation of contributions, either door-to-door or in public streets and ways, by any charitable organization that fails to submit proof that at least 75% of the funds received are used directly for the organization's "charitable purpose." In so doing, however, Ordinance § 22-20(g) defines "charitable purpose" to exclude in all events all amounts paid to solicitors, all salaries of the organization's other personnel, all attorneys' fees, all advertising costs and all other costs that it labels "administrative expenses." By denying a permit to, and prohibiting canvassing and solicitation by, any charitable organization that does not meet the 75% requirement as so defined, the Village imposes a prior restraint on such organization's exercise of First Amendment rights.

The District Court and the Court of Appeals properly found that Ordinance § 22-20(g) violated the First and Fourteenth Amendments both on its face and as applied to the Respondents, Citizens for a Better Environment ("CBE") and Larry Hoellwarth, an employee of CBE. CBE is an Illinois not-for-profit organization whose purposes and activities provide a classic case for First Amendment protection. It was created to protect, maintain and enhance the Illinois environment. To carry out that purpose it employs a staff of scientific and technical researchers and also a staff of canvassers who canvass door-to-door, disseminating and receiving information on environmental issues as well as accepting contributions. All amounts paid to those staff people are conclusively excluded by the Ordinance from being counted as part of the 75% requirement to obtain a permit.

This Court has consistently recognized door-to-door canvassing and solicitation of funds as activity protected by the First Amendment, particularly in light of its importance as a

source of support for new, small and unpopular causes. This Court's cases establish that any governmental restriction on canvassing and soliciting must be narrowly drawn to meet a compelling state interest with narrow specificity.

Orinance § 22-20(g) does not begin to approach those standards. It does not focus specifically on, or establish regulations directly related to, the two goals the Village asserts to support the Ordinance (prevention of fraud and protection of citizens from unwanted intrusion). Instead the Ordinance establishes a conclusive presumption that any charitable organization that fails to devote 75% of contributions to its charitable purpose —as "charitable purpose" is arbitrarily defined by the Ordinance, not by the organization or by the governments that have granted the organization status as a charity (in CBE's case, the State of Illinois and the United States Internal Revenue Service)—is no more than a "purported charity" and will be denied the right to solicit and canvass door-to-door and in public streets.

This conclusive presumption is inherently abritrary and unreasonable; there is no necessary nexus between the amount spent by a charitable organization on its administrative expenses and the prevention of fraud. Ordinances § 22-20(g) and its conclusive presumption are particularly unreasonable as applied to "public action" groups such as CBE, since the expenses of soliciting and canvassing and the salaries of environmental scientists and researchers are excluded by the Ordinance from the funds that can be counted as spent directly for CBE's "charitable purpose," even though the record here is undisputed that these and other CBE expenses are in fact spent for activities that further CBE's goals. But the Ordinance also operates arbitrarily as to the more "traditional" charities of nationwide scope. Its 75% requirement is not met by (for example) the American Cancer Society (Illinois Division) or by fully *one-half* of the 127 largest reporting organizations in Illinois (those having contributions of $100,000 or more); those 127 organiza-

tions involve total Illinois fundraising of $185,800,000, or 42% of all funds raised in the state.

By its operation, the Ordinance unreasonably prohibits First Amendment protected activity that constitutes both a vital source of support for CBE and an important means of spreading CBE's message. Thus, under the standards established by this Court, Ordinance § 22-20(g) is unconstitutional both on its face and as applied to CBE.

There is no genuine issue of material fact in this case, so that the District Court properly granted, and the Court of Appeals affirmed, CBE's motion for summary judgment. Because the Court of Appeals properly found Ordinance § 22-20(g) unconstitutional on its face, whether CBE would have been granted a permit to solicit under a properly drawn ordinance is not a material issue. Moreover, the Village's Answer to CBE's Complaint took the position that CBE's allegations as to its charitable purposes, and the activities of its canvassers to further those purposes, would not be relevant or material to the issues in the case even if true. Accordingly, the Village cannot now request trial on those very issues. Finally, summary judgment should be affirmed because the issue the Village now claims to require trial was not disputed or even identified by the Village before the trial court as a contested issue of fact.

The decision of the Court of Appeals affirming the decision of the District Court should be affirmed.

ARGUMENT.

I.

SCHAUMBURG'S CHARITABLE SOLICITATION ORDINANCE IS UNCONSTITUTIONAL BOTH ON ITS FACE AND AS APPLIED TO CBE.

This is a classic case for First Amendment protection. CBE is committed to one of the leading public issues of our time —preservation of the environment. That issue requires scientific and technical expertise; thus, to be effective CBE employs a research staff of scientists (A. 43). CBE is a citizens' organization. It is supported almost entirely by small contributions from individuals (A. 40). As an integral part of its activities, it employs a staff of canvassers who are trained and registered to go door-to-door distributing information on environmental issues and CBE's activities, answering questions and taking down pollution complaints for CBE research and possible action. Those canvassers also accept donations from individuals, the donations on which CBE relies for its existence.

Under the Ordinance CBE is prohibited from soliciting contributions either door-to-door or by using any public street or public way, because of its failure to prove that at least 75% of the proceeds of such solicitation "will be used directly for the charitable purposes of the organization." But the Village has defined "charitable purpose" to exclude in all events any amounts paid to solicitors (even though it is uncontroverted that CBE's solicitors engage directly in the programmatic charitable purposes of the organization) and any other amounts paid as salaries (even though it is uncontroverted that CBE's salaries include those of the very persons that carry out the organization's programs: an expert on nuclear power, a physicist, a biochemist,

a geneticist, an expert on electric utilities and a research associate).

By its prohibition of CBE's door-to-door and public solicitation, the Ordinance has cut off CBE's principal source of income, one vital to CBE's existence, and has prevented the information-gathering and -disseminating functions served by CBE's canvassers. It is plain that the First Amendment, as applied to local governments through the Fourteenth Amendment, prohibits such an absolute restraint on CBE's protected activities.

A. CBE's Dissemination of Information and Solicitation of Contributions Are Protected by the First Amendment.

Just such a combination of information dissemination and soliciting of contributions in door-to-door canvassing as CBE engages in has appeared in a number of cases before this Court, and this Court has consistently held such activity protected by the First Amendment.

Schneider v. *Irvington*, 308 U. S. 147 (1939) and *Cantwell* v. *Connecticut*, 310 U. S. 296 (1940) both involved Jehovah's Witnesses who canvassed door-to-door, distributing literature and soliciting contributions. In both cases the canvassers were arrested and charged with violating state or local laws that, like the Ordinance, required permits as a condition to such canvassing. In both cases this Court reversed the convictions, holding that the laws restricting such canvassing violated the First Amendment.

In *Schneider* the unconstitutional ordinance provided that no person could canvass or solicit money without reporting to and obtaining a permit from the police. The police could refuse a permit if the applicant was not of good character or the project was "not free from fraud." The petitioner did not apply for a permit and was arrested and convicted. The lower court sustained the ordinance against the petitioner's First Amendment challenge, saying (as the Village does here) that the ordinance

protected citizens from disturbance and annoyance, prevented unidentified strangers from going door-to-door and carried out the town's interest in protecting its citizens from fraudulent solicitation. In reversing the conviction this Court noted that while municipalities may pass ordinances to protect citizens, such ordinances may not infringe First Amendment rights (308 U. S. at 161):

> Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions.

This Court recognized that door-to-door canvassing can be "the most effective way of bringing [information] to the notice of individuals" (308 U. S. at 164).

Cantwell, too, was a permit case, this time arising under a statute that prohibited solicitation of contributions unless the cause was approved and a license issued by the Connecticut Secretary of Public Welfare, who would consider "whether such cause is a religious one or is a bona fide object of charity or philanthropy *and conforms to reasonable standards of efficiency and integrity* . . ." (310 U. S. at 302; emphasis added). Like the Village in the present case, the State in *Cantwell* declared the purpose of its statute was to protect against fraud and solicitation of funds by "purported charities." This Court struck down the statute, saying that although a State may regulate the time and place of solicitation, the law in question was not a *regulation*, it was a *prohibition*: Without the license from the Secretary of Public Welfare solicitation was prohibited, and the decision to grant or deny a permit was impermissibly left to the discretion of the State official (310 U. S. at 304, 307).

Although this Court in *Cantwell* discussed the religious nature of the canvassing involved there, *Cantwell* has been applied in the context of activities protected by other First Amendment guarantees. "The First Amendment gives freedom of mind the

same security as freedom of conscience." *Thomas* v. *Collins*, 323 U. S. 516, 531 (1945).

In a third case involving door-to-door canvassing, *Martin* v. *Struthers*, 319 U. S. 141 (1943), this Court recognized that governmental discretion in granting the right to canvass is not the only evil to be guarded against; an absolute prohibition involving no discretion on the part of an official can likewise be an unconstitutional restraint on the protected activity of door-to-door dissemination of information. In *Martin* the petitioner was convicted of violating an ordinance prohibiting all door-to-door distribution of literature. The city had decided that to protect its citizens against intrusion and crime, it would simply prohibit door-to-door activity. This, the Court said, infringed both the right of the petitioner to distribute and the right of the home owner to receive the message. Particularly significant for this case is the Court's recognition in *Martin* of the unique importance of door-to-door canvassing in preserving the political freedom the First Amendment is designed to safeguard, noting that the widespread use of door-to-door canvassing attests to its importance (319 U. S. at 145-47).

This Court's most recent consideration of door-to-door canvassing was in *Hynes* v. *Mayor of Oradell*, 425 U. S. 610 (1976), where it again found that a municipal ordinance impermissibly restrained First Amendment rights exercised in such canvassing. The ordinance in *Hynes* required that persons "desiring to canvass, *solicit* or call from house to house" [emphasis added] for a "recognized charitable cause" or "political campaign" register for identification only. This Court held that the vagueness of "recognized" charity and the ambiguity of "identification" were constitutionally fatal.

Though this Court did not find it necessary to decide whether the ordinance might also be considered unconstitutional on other grounds, *Hynes* is squarely in the tradition of the previous cases, reaffirming the protection afforded canvassing under the

First Amendment.[2] It similarly held that an ordinance regulating solicitation as well as canvassing must meet the tests of strict scrutiny applied to restrictions of constitutionally protected rights (425 U. S. at 616):

> [T]his Court has in several cases reviewed attempts by municipalities to regulate activities like canvassing and soliciting. Regulation in this area "must be done and the restriction applied in such a manner as not to intrude upon the rights of free speech and free assembly."

In *Hynes* this Court recognized a municipality's power to regulate canvassing and soliciting, but only if such regulations were "reasonable," "narrowly drawn" and "regulate only with narrow specificity." Just as the ordinance in *Hynes* could not meet these requirements, the Schaumburg Ordinance must be held invalid for the reasons next discussed.

B. Any Attempted Restraint Like That of Schaumburg's Ordinance Must Survive Strict Scrutiny To Be Held Constitutional.

In this case the Village also seeks, as did the local governments in *Schneider*, *Cantwell*, *Martin* and *Hynes*, to act as surrogate for the purported protection of its residents against canvassing. But it claims that those cases are inapposite because the Ordinance is a "regulation" and does not vest impermissible discretion in governmental officials.

In fact the Ordinance is not a *regulation* but a *prohibition*. *Cantwell* articulated the distinction between a regulation of "the times, places and manner of soliciting," which if properly drawn might be constitutionally acceptable, and a licensing procedure (310 U. S. at 304):

> The appellants are right in their insistence that the Act in question is not such a regulation. If a certificate is procured, solicitation is permitted without restraint but, in the absence of a certificate, solicitation is altogether prohibited.

2. See especially the concurring opinion of Justice Brennan, 425 U. S. at 623-31.

It is just so under the Ordinance: Solicitation by CBE is completely prohibited if it fails to secure a permit. Section 22-20(g) of the Ordinance conditions the issuance of the permit, and thus the solicitation of funds by CBE, on CBE's having provided proof satisfactory to the Village that 75% of the proceeds of solicitation be used directly for the "charitable purpose" of CBE—not as CBE defines that purpose, and not as that purpose has been defined by the State of Illinois and the Internal Revenue Service in granting CBE status as a charitable organization, but rather as it purports to be defined by the Village's Ordinance.

Of necessity the attempt by government to prohibit the exercise of First Amendment rights must be judged by rigorous standards. Only a "narrowly-drawn ordinance"[3] that serves a "compelling state interest"[4] with "narrow specificity"[5] and is "closely drawn to avoid unnecessary abridgment"[6] can "survive the exacting scrutiny necessitated by a state-imposed restriction on freedom of speech."[7]

For the same reason, any presumption of validity of municipal ordinances that may exist in other areas must give way to a stricter analysis when applied to a statute having a potentially inhibiting effect on First Amendment protected activities. *Hynes*, 425 U. S. at 620 and at 628 (Justice Brennan concurring). As this Court stated in *Thomas* v. *Collins*, 323 U. S. at 530:

> [T]he usual presumption supporting legislation is balanced by the preferred place given in our scheme to the great, the indispensible democratic freedoms secured by the First Amendment.

3. *Hynes*, 425 U. S. at 617.

4. *NAACP* v. *Button*, 371 U. S. 415, 439 (1963); *Illinois State Board of Elections* v. *Socialist Workers Party*, ... U. S. ....., 59 L. Ed. 2d 230, 241 (February 22, 1979).

5. *NAACP* v. *Button*, 371 U. S. at 433, quoted in *Hynes*, 425 U. S. at 620.

6. *Buckley* v. *Valeo*, 424 U. S. 1, 25 (1976).

7. *First National Bank of Boston* v. *Bellotti*, 435 U. S. 765, 786 (1978).

As a result, "Any prior restraint on expression comes to this Court with a heavy presumption against its validity." *Organization for a Better Austin* v. *Keefe*, 402 U. S. 415, 419 (1971).

Against this body of authority the Village asserts (Pet. Br. 28-29) that "When freedom of speech is coupled with the solicitation of funds, additional public interests are involved which warrant a less restrictive view of the state's right to regulate such activities." That assertion ignores the fact that in *Schneider* the activity involved was both the distribution of literature *and* the solicitation of contributions; this Court held that the strict scrutiny standard applied (308 U. S. at 161).

And in *Cantwell* this Court emphasized that the state's power to regulate solicitation is still limited by the scrutiny applied to ordinances restricting First Amendment rights (310 U. S. at 304):

> In every case the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom.

More recent cases have consistently reaffirmed that First Amendment rights are protected even when the exercise of those rights is "in the form of a solicitation to pay or contribute money." *Bates* v. *State Bar of Arizona*, 433 U. S. 350, 364 (1977). The Village's attempted reliance (Pet. Br. 23) on *Breard* v. *Alexandria*, 341 U. S. 622 (1951) is misplaced. Not only did *Breard* deal with a wholly commercial solicitation, unlike solicitation by a not-for-profit organization like CBE, but even as to purely commercial speech the force of *Breard* has been sharply undercut. See *Virginia Pharmacy Board* v. *Virginia Consumer Council*, 425 U. S. 748, 759 (1976), referring to the "simplistic approach" in *Breard*.

In sum, the exercise of any of the rights protected by the First Amendment is so central to our form of government that an ordinance potentially prohibiting or restraining that exercise must be subjected to exacting scrutiny. The fact that such

exercise also involves a solicitation for money does not diminish its protection under the First Amendment. Any regulation that unreasonably restricts that exercise must succumb to the overriding interests identified in the First Amendment.

C. Schaumburg's Ordinance Violates the First Amendment Under Any Standard of Review.

But we need not fall victim to the tyranny of labels. The precise measuring stick is not critical, for it is plain that the Ordinance must fail whether tested by more or less rigorous constitutional standards. It conclusively outlaws, as outside the scope of "charitable purposes," any funds used for a congeries of activities that *in fact* directly implement such purposes:

1. All salaries or commissions paid to canvassers are excluded from the permitted 75% calculation. Yet it is undisputed that the canvassers paid by CBE are trained employees who, in addition to soliciting funds, exercise rights protected under even the most restrictive view of the First Amendment: They disseminate information and respond to inquiries about environmental questions (A. 6); they distribute literature and receive pollution complaints and grievances (A. 6 and 41); they accept signatures to a statement of citizens' support for CBE's program (A. 41). The Village has not disputed or denied that the canvassers perform these functions; rather the Village's Answer (A. 27) stated that these functions are not "relevant or material to the issues in this case." It is clear, however, that all of these activities go directly to CBE's charitable purpose (A. 40):

> to encourage and assist the conservation of the environment, to provide educational and informational materials and programs concerning the environment and, in general, to promote the protection of the environment.

2. All other salaries are similarly excluded as part of "administrative expenses of the organization." That exclusion is equally arbitrary, as exemplified by the salaries of the CBE in-house research staff, including an expert on nuclear power, a physicist, a biochemist, a geneticist, an expert on electric utilities and a research associate (A. 43). Environmental issues are complex and technical, and any organization aspiring to influence environmental issues effectively must have access to technical expertise. Employment of such experts clearly goes directly to CBE's charitable purpose.
3. All attorneys' fees are also excluded as part of "administrative expenses." Yet this Court in *NAACP* v. *Button*, 371 U. S. 415, 429 (1963) recognized that litigation can be a most effective form of political expression. Any litigation by CBE raising environmental issues is directly related to CBE's charitable purpose, and attorneys' fees incurred for such purposes cannot therefore automatically be assigned (as the Ordinance does) to the disqualifying zone subject to the 25% limit.
4. Advertising is also excluded as part of "administrative expenses." Yet advertising also may constitute a form of expression protected by the First Amendment, *Bigelow* v. *Virginia*, 421 U. S. 809 (1975); *First National Bank of Boston* v. *Bellotti*, 435 U. S. 765 (1978); and costs of advertising to convey protected expression may go directly to the organization's charitable purpose.

It should scarcely be necessary to multiply the examples. What the Village has effectively done, by its arbitrary characterization of a number of major categories of expenditures as "non-charitable," is to dictate by legislative fiat the kinds of admittedly charitable organizations that its residents will or will

not hear messages from. CBE is program-oriented—both its solicitors and its staff are direct purveyors of its substantive environmental programs. For that very reason it has been barred from solicitation in the Village under the Ordinance.

It is of course not CBE alone that is affected by the arbitrariness of the labels (or more accurately the mis-labels) established by the Ordinance. The Coalition of National Voluntary Organizations, which has sought leave to file as an amicus curiae in this case, has compiled statistics demonstrating that door-to-door solicitation is vital even for many "traditional" charities of nationwide scope (Amicus Br. 10-12) and that an arbitrary limit of 25% on salaries and administration expenses is an unreasonable restraint on all charities, particularly in light of the rising costs of fundraising and of performing charitable activities (Amicus Br. 8-9).

Even if the Ordinance had included *only* fundraising costs as the only category of expenditure subject to the more-than-25% disqualification, the same conclusion as to the arbitrariness of the ordinance is compelled in a most striking way by a published study of all charitable solicitation in Illinois. Malvern J. Gross, Jr., the partner of Price Waterhouse & Co. who is perhaps the principal writer on subjects of accounting for non-profit organizations,[8] published an article entitled "Costs of Fundraising" in the March 1975 issue of *Philanthropy Monthly*. The article reported the results of a computer analysis of all financial statements on file in the Illinois Attorney General's Office under the Illinois statute requiring such reporting by organizations soliciting contributions. That study analyzed the *largest* reporting organizations (those having total contributions of $100,000 or more) and reflected that 127 of them—which had raised funds totaling $185,800,000, or 42% of *all* funds raised in Illinois—had an *average* fund-raising cost of 26%! Thus

8. In addition to having written a number of articles on fund-raising costs and accounting, Mr. Gross is the co-author of *Financial and Accounting Guide for Nonprofit Organizations* (3d Ed. 1979).

more than one-half of even such organizations could not pass muster under the 75% requirement of the Ordinance. Can there be any question but that the "standard" established by the Ordinance, sought to be justified by the Village on a conclusive presumption of fraudulent fundraising activity if the 75% test is not met, is unreasonable and arbitrary?

It should not however be assumed that a prohibition like that of the Ordinance operates with a kind of impartial arbitrariness, for it is most punitive in its effect on smaller charities. "Door to door distribution of circulars is essential to the poorly financed causes of little people." *Martin* v. *Struthers*, 319 U. S. at 146. Justice Black there reviewed the history of door-to-door canvassing as a significant method of disseminating ideas (see also Justice Brennan's concurring opinion in *Hynes*, 425 U. S. at 624). Similarly, door-to-door solicitation of funds and the use of public ways to solicit funds are also vital to new and poorly financed causes and those causes whose political, social or religious beliefs make them less likely to receive funds from established philanthropists. Such groups may not be able to afford the more expensive means of fundraising, and must perforce rely on grass-roots support. For example, CBE is almost entirely supported by small contributions from individuals; its door-to-door canvass is the single most important source of its funds (A. 40).

Thus an arbitrary limit of 25% on salaries and administration expenses hits particularly hard at new and unpopular causes. The cost of starting, staffing and making the public aware of an organization (including advertising) in its first few years of existence can well exceed 25% of contributions. The newer organization is less able to depend on volunteer canvassers and thus may have to rely on paid canvassers to spread its message and solicit funds. Further, canvassers for an unpopular cause may have to be paid relatively high salaries. See the opinion below, 590 F. 2d at 225.

For all of the reasons discussed above, a prohibition of solicitation by any organization that fails to prove that 75% of contributions go directly to "charitable purposes"—as arbitrarily defined by the Ordinance to exclude such costs as salaries of staff and canvassers—constitutes an unreasonable restraint on that organization's right to solicit funds necessary for its survival.

That unreasonableness is particularly egregious as applied to a public action group such as CBE, which incurs costs characterized by Ordinance § 22-20(g) as "administrative" to fulfill its purposes: providing information about environmental issues and promoting protection of the environment. A public action group tackling a politically difficult issue like pollution control can expect to cross swords with established interests. Advocating strong positions on environmental issues may effectively deprive the CBE of large corporate and foundation donors on which a "traditional" charity may be able to depend. Solicitation of individual donors is thus even more important to a public interest organization than to a "traditional" charity.

Yet protection of citizen-supported organizations that advocate political opinions unpopular with established interests is one special constitutional role of the First Amendment. Any governmental action that threatens to silence such organizations by simultaneously cutting off their primary source of funds and their opportunity to reach individual citizens in their homes is constitutionally infirm. Ordinance § 22-20(g) unjustifiably and arbitrarily ignores the program functions served by such costs as canvassers' salaries and salaries of research personnel and thus unreasonably restrains CBE's activities protected by the First Amendment.

D. Schaumburg's Ordinance Is Not "Narrowly Drawn" To Serve a "Compelling State Interest."

Against all of the foregoing, the Village seeks to draw support for the 75% requirement in the Ordinance almost entirely from the Village's power to protect its citizens from fraudulent solicitation. Throughout its Brief the Village implies that any charitable organization that cannot prove that 75% of its contributions go directly to its "charitable purpose" is a fraud.[9]

Effectively the Village has created a conclusive presumption that any organization that devotes more than 25% of its funds to salaries or the other expenses listed in Ordinance § 22-20(g) is a fraud—even though those expenses are *actually* used to further the charitable goals of the organization. Any such conclusive presumption must be invalid: There is no necessary nexus between the 75% requirement and the prevention of fraud; certainly the "intimate relationship" necessary between the governmental interest purportedly sought to be protected and the means chosen to attain that interest is completely absent.

According to the Village (Pet. Br. 21 and 29), any organization that uses an aggregate of more than 25% of its income for all of the items listed in Ordinance § 22-20(g) cannot be a "bona-fide charitable organization" and can be excluded from soliciting in the Village because it is really a "commercial enterprise" and a "for profit venture."[10] The Village suggests no

9. Thus the Village refers to the Ordinance as a protection against "fraudulent and disruptive solicitation" (Pet. Br. 10). It asserts that it has an interest in "protecting its citizens from fraud by solicitors who would use the funds collected for purposes other than those expressly or impliedly represented" and "in identifying organizations where salaries paid are so large in relation to the services provided that the organization is actually a for-profit venture" (Pet. Br. 13). It similarly implies that organizations that do not meet the 75% requirement are "mere conduits for the commercial gain of their sponsors" (Pet. Br. 21) and "purportedly charitable organizations" (Pet. Br. 27) and "so-called charitable organizations" (Pet. Br. 31). See also Pet. Brief 28-30.

10. There is a Kafkaesque quality in this Village effort to attach a "for profit" label to CBE. Ordinance § 22-20 (involved in this case) is part of Article III, applicable to "charitable organizations" only. Article II (A. 18-22) of the same Ordinance applies to "for profit" solicitors; and if it were applied to any organization exercising First Amendment Rights, such as CBE, the permit provisions of Ordinance §§ 22-7 to 22-9 would fly directly in the teeth of *Schneider* v. *Irvington*, 308 U. S. 147 (1940). So it is that the Village seeks to substitute one unconstitutional restraint on CBE for another.

reason why 25% is an appropriate demarcation. Nor does it suggest any reason why it is reasonable to exclude all salaries of researchers and all the other costs specified in Section 22-20(g) from the concept of funds used directly for the "charitable purpose," notwithstanding that it is uncontested that CBE's paid canvassers perform program-related services as well as fund-raising.

There is of course the best of reasons for the Village's failure to address those problems—it simply cannot. Our discussion, in the preceding section of this Brief, of the study in *Philanthropy Monthly* demonstrates the irrationality of a rigid 75-25 ratio (even if the 25% were limited, as it is not under the Ordinance, to fundraising costs alone). In fact, the very effort of the numerous major voluntary organizations comprising The Coalition of National Voluntary Organizations to enter this case as amicus curiae compels the same conclusion.[11]

It is not surprising that the common sense of this issue is also echoed in sound accounting practices for non-profit organizations. Thus the American Institute of Certified Public Accountants has proposed a set of Accounting Principles and Reporting Practices for Nonprofit Organizations Not Covered by Existing AICPA Industry Audit Guides (1977 Discussion Draft). That proposal specifically recognizes and approves a functional classification of expenses for nonprofit organizations. Some part of the salaries of staff and costs of fundraising are properly considered "program services," that is costs of the charitable purpose of the organization.[12] That sensible and realistic treatment is

11. For example, one of the newspaper articles attached to the Village's Answer (A. 36) reports the salary and benefit costs of the American Cancer Society (Illinois Division) as 27% of funds collected.

12. Particularly notable is the treatment of fundraising costs when fundraising activities also serve a program function (Section 60 of the Discussion Draft):

> "When an organization combines the fund-raising function with a program function (i.e., as a piece of educational litera-

(Footnote continued on next page.)

rejected by the all-or-nothing (or really just nothing) stance taken by the Ordinance.

Most importantly on this score, the Village shows no connection (rational or otherwise) between the percentage of costs going to administrative expenses and the existence of any deception or fraud on the part of the organization. There is no showing, or even attempted showing, of fraud.[13] Instead, under the conclusive presumption of the Ordinance, the Village has irrefutably determined, without proof, that any organization unable to meet the 75% requirement is a "commercial venture" that "uses the cloak of charity to mask [its] pursuit of commercial gain" (Pet. Br. 29). The Ordinance excludes from the Village organizations like CBE (and large numbers of the major charitable organizations) on the conclusive presumption that they are "fraudulent," without their being given any opportunity to rebut that presumption.

This Court has held that the Constitution forbids a state to deny right or benefits on the basis of a "permanent and irrebutable presumption . . . when that presumption is not necessarily or universally true in fact, and when the State has reasonable alternative means of making the crucial determination." *Vlandis* v. *Kline*, 412 U. S. 441, 452 (1973). Under this standard, the presumption inherent in the Ordinance is clearly invalid. It is

(Footnote continued from preceding page.)

> ture that combines a description of a program-related activity with a request for funds), the costs should be allocated to the program and fund-raising categories on the basis of the use made of the literature as determined from its content, the reasons for its distribution, and the audience to whom it is addressed."

13. It should be noted that Illinois has statutory registration and disclosure provisions regarding the solicitation of funds for charitable purposes (Ill. Rev. Stat. ch. 23, §§ 5101 et seq.), with which CBE has complied, that in part vest in the Illinois Attorney General the responsibility for enforcement and seeking injunctive relief against fraudulent solicitation (§ 5109). Under the Ordinance, any organization applying for a permit to solicit in the Village must submit a written statement from the Attorney General confirming the organization's compliance with the Illinois statute.

simply not true that expenses the Village conclusively deems excluded from the "charitable purpose" are not in fact used for that purpose; and the Village has "reasonable alternative means" of policing fraud.

In this respect the Village is not writing on a clean slate. All the arguments advanced by the Village have been raised repeatedly in support of laws prohibiting or regulating door-to-door canvassing and soliciting. While acknowledging the state's interest in protecting its citizens against fraud, crime and intrusion, this Court has struck down regulations that, like the Ordinance, intrude on constitutionally protected rights. In *Schneider* this Court stated that the prevention of fraudulent solicitation in the name of charity could not justify a municipal ordinance giving the police arbitrary power to determine what causes could canvass and solicit door-to-door (308 U. S. at 164):

> Frauds may be denounced as offenses and punished by law. Trespasses may similarly be forbidden. If it is said that these means are less efficient and convenient than bestowal of power on police authorities to decide what information may be disseminated from house to house, and who may impart the information, the answer is that considerations of this sort do not empower a municipality to abridge freedom of speech and press.

Similarly, the Village asserts its right to protect its citizens from unwanted intrusion in their homes. But as this Court noted in *Martin* v. *Struthers* (319 U. S. at 144), a governmental action prohibiting canvassing by any group restricts the rights of those citizens who would want to receive CBE's message and to contribute, as well as restricting CBE's right to reach those citizens with its message and to ask for their support. Unlike a "trespass-after-warning" statute that enforces an individual homeowner's decision not to allow canvassers and "leaves the decision as to whether distributors of literature may lawfully call at a home . . . with the homeowner himself" (319 U. S. at

148), a prohibition on canvassing "substitutes the judgment of the community for the judgment of the individual householder" (319 U. S. at 144). This Court concluded in *Martin* that "since the dangers of distribution can so easily be controlled by traditional legal methods," the municipality's ordinance was an unreasonable restraint on First Amendment rights (319 U. S. at 147).

It is thus plain that the Ordinance is far from the "narrowly drawn regulation" of solicitation that this Court suggested in *Hynes* might be consistent with the First Amendment. Instead the Ordinance sets up a conclusive presumption that an organization is not a "bona fide charity," but a "commercial" "for profit venture," if it devotes more than 25% of its funds to expenses arbitrarily categorized by the Village as not directly for the organization's charitable purpose. That conclusive presumption is not based in fact, because the Village excludes from its definition of "charitable purpose" expenses that really are part of the charitable purpose and also because there is no necessary relationship between fraud and the percentage of funds devoted to administration. The goals the Village claims to seek can be achieved by ordinances that focus directly on whether any charity is a fraud, and by anti-trespassing ordinances. As the consequence of the Ordinance's conclusive presumption, CBE and other organizations are denied the right to engage in door-to-door canvassing in the Village; and because the Ordinance is clearly not drawn with "narrow specificity" to protect that right, it unreasonably restrains CBE's First Amendment rights.

E. Schaumburg's Ordinance Draws No Support from Applicable Case Law.

Petitioner's Brief 16-18 seeks to rely heavily on the decision of the Fifth Circuit in *National Foundation* v. *City of Fort Worth*, 415 F. 2d 41 (1969). Like the Village's other efforts to invoke supporting authority, that reliance is misplaced.

First, *National Foundation* was decided in 1969, before this Court's decision in *Hynes*. It is at least questionable whether the ordinance considered in *National Foundation* could meet the standards established in *Hynes*.[14]

However, the Village can derive no sustenance from the decision in *National Foundation* in any case, because the Schaumburg Ordinance creates an invalid conclusive presumption not present in the Fort Worth ordinance. The Fort Worth ordinance required an organization applying for a permit to submit information concerning the expected cost of solicitation in relation to the expected gross amount to be collected, and allowed the city to deny the permit if the ratio of cost of solicitation to collections was "excessive." Although the ordinance provided that a cost in excess of 20% of amount of collections "shall be deemed to be unreasonable," it allowed the applicant an opportunity to show that a cost higher than 20% was not unreasonable.

Indeed, the Fifth Circuit's decision rested on the fact that the Fort Worth ordinance did *not* create a fixed percentage requirement, as the Village's Ordinance here does (415 F. 2d at 46):

> A fixed percentage limitation on the costs of solicitation might be undesirable and inapplicable if applied to all types of charitable organizations. What may be proper in one situation may not be so in other situations.

14. The ordinance considered in National Foundation (415 F. 2d at 43-44) allowed the city's charitable solicitations commission to make "such investigation [of charities applying for permits to solicit] as shall by the commission be deemed necessary" to find out if the officers and agents of the applicant are responsible persons of good character with reputation for honesty and integrity. The ambiguity thus inherent in the ordinance violates the requirement set out in *Hynes* that the ordinance "provide explicit standards for those who apply it" (425 U. S. at 622). Further, the court in *National Foundation* applied only a test of reasonableness. It did not consider the ordinance in light of the standards set out in *Hynes*: that regulation in the area of canvassing and soliciting must be done with "narrow specificity," and that the restriction must be applied in such a manner as not to intrude upon First Amendment rights.

The clear implication of this statement is that a fixed percentage limitation such as the Village's § 22-20(g) would be unreasonable.

Moreover, the Fort Worth ordinance concerned a ratio of *costs of solicitation* to expected receipts. The Court in *National Foundation* did not consider the problem faced in the present case: whether an ordinance that prohibits solicitation unless a percentage of contributions goes directly to the charitable purpose may exclude from that charitable purpose salaries and other expenses that, in part at least, are used for communicating the organization's message and furthering its programs.

As the Seventh Circuit stated in this case (590 F. 2d at 226), the flexibility of the ordinance considered by the Fifth Circuit in *National Foundation* is not present in the Schaumburg Ordinance. Thus *National Foundation* gives no comfort to the conclusive presumption established by the Ordinance's rigid percentage requirement.

Nor does *People ex rel. Scott* v. *Police Hall of Fame*, 60 Ill. App. 3d 331 (1st Dist. 1978), also cited by the Village (Pet. Br. 31-32), approve the conclusive presumption of the Ordinance. In that case the Illinois Attorney General sued a charitable organization and its fundraisers for violation of Ill. Rev. Stat. ch. 23, § 5109(c), which requires that 75% of the gross receipts of a solicitation be used for charitable purposes.[15] Significantly "gross receipts" is defined by the statute as receipts *after the deduction* of the "legitimate and reasonable costs of services required with the fundraising event or program."

Unlike the Ordinance, the Illinois statute does not automatically presume that certain types of costs are not "for charitable purposes," and it does not create an irrebutable presumption that expenditure of more than 25% for fundraising

15. As already noted, the Ordinance requires that an organization seeking to solicit in Schaumburg present a written statement from the Illinois Attorney General that it has complied with this statute.

constitutes fraud. On the contrary, the Illinois statute allows a deduction of "legitimate and reasonable" expenses of *any* amount, applying the 75% requirement to "gross receipts" only after those expenses have been deducted. As the Illinois Appellate Court noted (60 Ill. App. 3d at 340), under the statute,

> If the Attorney General is able to prove that some of the costs deducted bore no relationship to the fund-raising efforts or were fabricated or illegal expenses, then such charges may not be deducted when computing gross receipts. There may be many factors to be considered in determining what constitutes legitimate and reasonable costs in a particular fund raising campaign.

Unlike the Illinois statute, the Ordinance allows no consideration of the "many factors" that may be considered in determining legitimate and reasonable fundraising expenses, substituting instead an unreasonable fixed percentage requirement.

More relevant for present purposes are decisions by the two courts (in addition to the courts below) that have considered ordinances less restrictive than Schaumburg's, but prohibiting soliciting where the cost of fundraising would exceed 25% of the amount raised. In each instance such courts, like the lower courts in this case, have found such ordinances unconstitutional. In *Carolina Action* v. *Pickard*, 420 F. Supp. 310 (W. D. N. C. 1976), the court temporarily enjoined enforcement of a 25% limitation (420 F. Supp. at 311):

> The ordinance is overbroad; the 25% limitation, as this Court views it, is unrelated to and does not protect against fraud or violence on the part of solicitors; such protection, in fact, is not its stated purpose.

This year the same court entered final judgment for the plaintiffs and permanently enjoined enforcement of the 25% limitation, 465 F. Supp. 576, 581 (W. D. N. C. 1979):

> The mandatory imposition of the 25% cost-of-solicitation rule set out in § 2-30 is overly broad. It stultifies protected speech, as it makes the ability to engage in neighborhood canvassing-solicitation dependent on a showing that plaintiff's representatives and ideas will be sufficiently popular to obtain at least $3 in contributions above every $1 expended in the canvass. Such a requirement is likely to operate most seriously to the detriment of those organizations espousing unusual or unpopular views and therefore most urgently in need of protection from encroachments on their First Amendment rights.

A similar ordinance considered in *Swearson* v. *Meyers*, 455 F. Supp. 88 (D. Kan. 1978), was found unconstitutionally vague. Although it was not necessary to decide if the ordinance was also overbroad, the Court suggested that a rewriting of the ordinance should consider that issue.

II.

THERE ARE NO GENUINE ISSUES OF MATERIAL FACT. THE DISTRICT COURT PROPERLY GRANTED SUMMARY JUDGMENT.

The District Court granted summary judgment in favor of the Plaintiffs-Respondents, and the Court of Appeals affirmed that judgment. The Village now asks this Court to reverse that judgment, asserting (Pet. Br. 10):

> The Village was deprived of its opportunity to show that, in fact, the respondent was principally engaged in solicitation of funds for profit and was misusing the guise of environmental protection and free speech for its commercial gain.

That position is entirely groundless. Rule 56 of the Federal Rules of Civil Procedure requires that the Court grant summary judgment where there are no genuine issues of *material* fact. The Village's effort to overturn the summary judgment granted to the CBE must fail on two independent counts: The issue the Village now raises is not material to the constitutionality of the Ordinance, and in any event the Village did not contest below the issues for which it now seeks a trial.

A. The Ordinance Is Invalid on Its Face, and Therefore Evidence as to Whether CBE Would Be Denied a Permit Under a Valid Ordinance Is Not Material.

It is essential to the Village's argument in this respect to show, as the Village repeatedly asserts, that the Court of Appeals did not find the Ordinance unconstitutional on its face (Pet. Br. 33 and 34). But that linchpin is missing entirely, for the Village's assertion is simply contrary to the express finding of the Court of Appeals (590 F. 2d at 225):

> However, for the reasons stated below, the requirement is *on its face unreasonable* when applied to an organization which by its nature allegedly devotes a large portion of its efforts to information gathering and promotion of its objectives, and where its paid solicitors necessarily combine solicitation with other primary activities of the organization. (Emphasis added.)

Thus the Court of Appeals squarely affirmed the District Court finding (A. 53) that the 75% requirement of the ordinance is invalid *on its face.*

In an effort to escape that plain language and specific holding, the Village seeks to play upon the functional distinction drawn by the Court of Appeals between "traditional charities" and "public interest groups" "more oriented toward advocacy" (590 F. 2d at 225). In view of the fact that "CBE holds itself out to be" the latter type of organization (590 F. 2d at 225), the Court held the Ordinance unconstitutional *on its face* when used to prohibit soliciting by such organizations, declining to rule on the constitutionality of the Ordinance as applied to "traditional charities." That is the only *material* distinction made in the Court of Appeals decision, and as to that distinction there are no controverted issues of fact.[16]

16. The Court of Appeals stated that the 75% requirement is invalid as applied to the type of organization (1) that "by its nature allegedly devotes a large portion of its efforts to information gather-

(Footnote continued on next page.)

Although the Village attempts to use that distinction as justification for a trial, it does not seek a trial on any issue material to that distinction (Pet. Br. 34). The Village does not contend that the trial it now asks would determine whether CBE was properly classified as a "public interest group" rather than a "traditional charity."

As the Court of Appeals correctly perceived, the issue is not whether CBE would have been denied a permit under an ordinance that was properly drawn to screen fraudulent solicitation (590 F. 2d at 223, quoting *NAACP* v. *Button,* 371 U. S. at 432). See also, *Bigelow* v. *Virginia,* 421 U. S. 809, 815-16 (1975), and cases cited therein. There are simply no issues of fact material to the constitutionality of the Ordinance on its face.

B. The Village's Request for Trial on the Activities of CBE's Canvassers Is Entirely Contrary to Its Position Below.

Before this Court the Village asserts that it was denied an opportunity to inquire into the question of "just what the CBE does that brings it within the purview of the First Amendment protection," contending that "the very nature of the organization is controverted in the pleadings" (Pet. Br. 40). That position is flatly contradicted by the record.

(Footnote continued from preceding page.)

ing and promotion of its objectives," and (2) "where its paid solicitors necessarily combine solicitation with other primary objectives of the organization" (590 F. 2d at 225). There is no dispute that CBE fits both of these criteria. Among the stated purposes of CBE is "to provide educational and informational materials and programs concerning the environment" (A. 40). CBE's verified Amended Complaint (A. 6) and the Affidavit of Larry Hoellwarth (A. 40-41) both set out facts showing that CBE's canvassers work to fulfill this purpose and "combine solicitation with other primary objectives." The Village did not dispute or deny these facts in the lower courts; on the contrary, the Village in its Answer took the position that the allegations of paragraph 3 of the Amended Complaint, concerning CBE's purposes and the activities of its canvassers, "even if true would not be relevant or material to the issues in this case . . ." (A. 27).

Paragraph 3 of CBE's verified Amended Complaint (A. 6) specifically alleged that CBE is a not-for-profit corporation registered and in good standing with the Illinois Attorney General's Charitable Trust Division and granted tax-exempt status by the United States Internal Revenue Service; that its purpose is to protect the Illinois environment; that incident to its purpose, CBE employs canvassers who distribute literature and answer questions on environmental topics, receive pollution complaints and perform other functions to further CBE's purposes, as well as soliciting contributions; and that the canvassing procedure is an effective means of informing the public that CBE is a source of assistance to deal with future problems of an environmental nature. Those facts are of course at the heart of CBE's First Amendment standing; they are the facts that were further fleshed out in the Hoellwarth affidavit (A. 40-41).

In its Answer (A. 26-27) the Village specifically made this case one of *law* and not of *fact:*

> [T]he facts alleged in said paragraph 3 even if true, would not be relevant or material to the issues in this case with the exception that the Defendants state on information and belief that the CBE employs "canvassers" who solicit funds for the purported purposes of the organization.

That position was simply the classic demurrer: "Even if the allegations of CBE are true in fact, it has no case on the law." Having itself characterized the factual statements as irrelevant and immaterial, the Village simply cannot now be heard to urge a remand of the case for trial of those very issues.

C. The Village Did Not Raise Any Issues of Fact Before the District Court.

Either of the reasons just discussed should be fully dispositive of the Village's argument on summary judgment. However, there is still another and equally dispositive reason to deny the Village's request for a trial: The Village failed to present any

factual material to the District Court to show that a contested issue of fact existed.

Rule 56(e) of the Federal Rules of Civil Procedure is explicit on this score:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

Not only did the Village fail to file any affidavits or other factual material allowed by Rule 56 to oppose CBE's motion, but the Village failed even to *list* for the District Court the issues of fact it felt was contested, and the Village never raised as a material contested issue the alleged "commercial" nature of CBE.

1. CBE's Motion Showed That No Genuine Issue of Material Fact Existed.

In support of its motion for summary judgment, CBE submitted two affidavits:

> (a) Co-plaintiff Larry Hoellwarth (A. 40-41) described the purposes of CBE and the activities of its canvassers in receiving and disseminating information on environmental topics and gathering signatures of statement of citizens' support for CBE's program.
>
> (b) Kenneth Arway (A. 43) described the results of CBE's 1975 and 1976 certified audits and the personnel comprising CBE's in-house technical research staff.

These materials, supplementing CBE's verified Amended Complaint, establish the underlying facts supporting the summary judgment. Even assuming that the Village's now-asserted allegation of CBE's commercial nature were relevant, no inference of commercialism could be drawn from these materials.

2. The Village Did Not Raise Before the District Court the Issue for Which It Now Seeks Trial.

In response to CBE's motion the Village filed an Answer to Motion for Summary Judgment (A. 42), asserting only legal conclusions and denials. Its Answer did not even raise the issue the Village now seeks to assert—the alleged commercial nature of CBE. Clearly, Fed. R. Civ. P. 56(e) requires that the Village do more than simply assert that genuine issues of fact exist. For the benefit of the District Court the opponent to a motion for summary judgment must at least identify the issues of fact it believes to exist. The opponent may not wait until appeal to identify the issues:

> [A]ppellant may not overturn a summary judgment by raising here an issue of fact that was not plainly disclosed as a genuine issue in the trial court.

Ring Engineering Co. v. *Otis Elevator Co.*, 179 F. 2d 812 (D. C. Cir. 1950);[17] see also, 6 Moore, Federal Practice ¶ 56.11[3] at 56-247 to 56-248 (2d ed. 1976):

> [A party opposing summary judgment] may not hold back his evidence until trial; he must present sufficient materials to show that there is a triable issue.

While it is true that Rule 56(e) does not permit summary judgment if an issue of fact exists, it does require of the party opposing summary judgment that:

> . . . sufficient evidence supporting the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial.

First National Bank of Arizona v. *Cities Service Co.*, 391 U. S. 253, 289 (1968). Here, the Village presented to the trial court *no* material presenting a "differing version" of the facts.

17. The Seventh Circuit has also refused to disturb summary judgment when the opponent waited until appeal to point out the "specific facts" he believed showed the existence of an issue of fact. *Faulkner* v. *Baldwin Piano & Organ Co.*, 561 F. 2d 677, 683 (7th Cir. 1977).

Before this Court, the Village now suggests that two items indicate an issue of fact: first, its allegation in its Answer (¶ 43; A. 33) on information and belief that CBE is "primarily devoted to raising funds"; and second, the newspaper articles attached to the Village's Answer (A. 35-37). Although for the reasons already discussed this entire argument is not properly before this Court and should be dismissed out of hand, we will treat briefly with the two items.

As to the first of these, Rule 56(e) makes clear that allegations and denials are *not* sufficient to raise an issue of fact. Further, this Court has ruled that statements made on information and belief do not meet the requirement of Rule 56(e) that supporting and opposing affidavits shall be made on personal knowledge. Therefore, such statements, even if verified, must be disregarded on a motion for summary judgment. *Automatic Radio Mfg. Co.* v. *Hazeltine Research, Inc.*, 339 U. S. 827, 831 (1950).[18]

As to the second item, the newspaper articles attached to the Village's Answer are both legally and factually insufficient to raise a material question of fact. Such newspaper articles, unverified and pure hearsay, are not admissible materials to oppose a motion for summary judgment. *Lacey* v. *Lumber Mutual Fire Ins. Co. of Boston*, 554 F. 2d 1204 (1st Cir. 1977) (a memorandum is neither an affidavit nor evidence; therefore it does not meet Rule 56(e) standards).

18. Contrary to the assertion by the Village (Pet. Br. 38) CBE did controvert the allegations in the Village's affirmative defense. Mr. Arway's affidavit sets out the results of CBE's certified audits, clearly refuting the Village's allegation that "more than 60% of the funds collected [by CBE] have been spent for the benefit of employees." But under Rule 7(a) of the Federal Rules of Civil Procedure, no reply to affirmative defenses is required. Under Fed. R. Civ. P. 8(d), "Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided." Thus, the Village's statement that "the allegations in the answer as affirmative defenses, including the exhibits, must be taken as true" is incorrect as a matter of law.

But examining the articles relied on by the Village shows that they create no question of fact concerning the Village's alleged affirmative defense. The articles support CBE's position that its activities further its stated goals and are protected by the First Amendment.[19]

The articles likewise give no support to the Village's assertion that "CBE is primarily devoted to raising funds for the benefit and salary of its employees."[20] Thus, had the District Court improperly considered these unsupported articles it would have come to the conclusion that they raise no triable issue of fact.

This entire issue, sought to be raised as it is before this Court by the Village, is at best ill-founded. The Village used none of the extensive discovery tools available under the Federal Rules of Civil Procedure—for example, depositions, production of documents or interrogatories—to develop a factual record to oppose CBE's motion for summary judgment in the trial court. Nor did the Village apply to the trial court for relief under Rule 56(f), which allows the court to deny a motion for summary judgment

19. "Since its founding in 1971, CBE has developed a program of research and legal action primarily directed at forcing private industries and government agencies to clean up air and water pollution" (A. 35).

"Suburban Task Force reporters talked to more than 29 past and present employees of both organizations and found that all—even those who quit in internal disputes—believe that the organizations are making significant accomplishments" (A. 36).

"DONALD G. MULACK, chief of the Charitable Trusts and Solicitation Division of the Illinois attorney general's office, said in a recent interview that although his office is convinced of CBE's commitment to environmental issues, it continues to monitor the group's solicitation practices, registration of solicitors, and allocation of funds" (A. 36).

20. " 'When you look at the percentage of funds spent on programs,' Anderson said, 'these organizations [CBE and Public Action] are in the upper 50 percent of nonprofit organizations.' A former researcher for CBE said he had studied other citizen action groups and found CBE to be one of the most efficient" (A. 36).

or to allow discovery to be taken where an opponent cannot present opposing facts by affidavit.

The fact is simply that the Village made no effort to oppose summary judgment below, and that it did not even identify to the trial court as a relevant issue of fact the alleged commercial nature of CBE. Having made no presentation to the trial court to show that summary judgment was inappropriate, the Village should not be heard to complain on appeal that it was denied a trial.

CONCLUSION.

Schaumburg's Ordinance, both on its face and as applied to CBE, silences CBE's voice by barring it from communicating information and soliciting support—a result not countenanced by the First Amendment. Schaumburg insists that the Ordinance does not suffer from the vice of vagueness, because the 75% test is precise and does not vest impermissible discretion in its officials. If that is so, the precision has been purchased by creating the equally impermissible vice of overbreadth. Governmental discretion without standards is only one constitutionally prohibited defect; an unreasonable restraint that grants no discretion is also constitutionally invalid.

For the reasons stated in this Brief, the judgment of the courts below should be affirmed.

Respectfully submitted,

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